Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

COMMENTS OF CORE COMMUNICATIONS, INC.

Core Communications, Inc. ("Core") respectfully submits these comments in response to Section XV of the Commission's Notice of Proposed Rulemaking ("NPRM") released on February 9, 2011 (FCC 11-13) in the above-referenced dockets.

I. Goals of Interim Measures

According to the NPRM, the primary aim of the interim measures addressing VOIP, phantom traffic, and access stimulation is to "reduce and eventually eliminate opportunities and incentives for arbitrage." NPRM, ¶ 603. However, the NPRM fails to define "arbitrage" and fails to identify the statutory provisions which permit or require it to combat "arbitrage" – and of course no such statutory provisions actually exist. These failings are notable because, in economic theory and practice, arbitrage is normally considered a positive phenomenon, not a negative one.

According to one prominent U.S. Court of Appeals judge, Richard A. Posner of the U.S. Court of Appeals, Seventh Circuit:

> An arbitrage opportunity arises when the same thing is being sold at two different prices and the difference is due to some oversight or other error, or to price discrimination (charging different prices for the same good or service on the basis of different intensities of consumer demand for it), rather than to costs of transportation or other circumstances that might place the good in different markets and thus prevent uniform pricing. The arbitrageur spots the artificial price difference, buys at the lower price, and resells at the higher price. The effect is to bring about price uniformity, which terminates the arbitrage opportunity. Arbitrage is a socially useful activity because if the same good or service, costing the same and traded or tradable in the same market, is selling at different prices, one of those prices is too high (excluding the case in which one of the goods is selling below cost, in which event the price is too low) from the standpoint of an efficient allocation of resources.[1]

Economics, in short, defines arbitrage as a beneficial, market-based reaction to the existence of arbitrary price differences. None of the three issues the Commission proposes to address in its interim measures cleanly fits this definition of arbitrage. Indeed, it is difficult to imagine any one definition of "arbitrage" (economic or not) that would readily encompass these three interim measures issues. The VOIP and phantom traffic issues involve unlawful or at best quasi-lawful payment avoidance. The access stimulation issue involves lawful collection of a tariffed rate that the carriers that are billed believe to be too high. And to the extent access stimulation constitutes economic arbitrage, it should be perceived as a beneficial phenomenon, the solution to which is to bring about price or rate uniformity, not the anti-market interim

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1 *Emerald Investments L.P. v. Allamerica Fin. Life Ins. and Annuity Co.*, 516 F.3d 612, at 614 (7th Cir. 2008).

measures proposed in the NPRM. If the Commission does premise its rules on combating "arbitrage," it should first utilize the current rulemaking process to define the term once and for all. Further, it should explain how combating arbitrage benefits the public interest and statutory objectives—not just the financial interest of particular carriers or classes of carriers who stand to realize a regulatory windfall.

The characterization of access stimulation as "arbitrage" is particularly curious, in that the underlying rationale for the relatively high access charges being imposed by rural LECs is these carriers' purportedly high costs of furnishing service in sparsely populated areas. If rural LEC access charges accurately reflect rural LEC access costs, there is no "arbitrage." On the other hand, access stimulation could be considered a form of economic arbitrage if the cost of providing termination in rural LEC territories is the same as the cost of providing termination in other service territories. That would, of course, undermine the very basis for the difference in rates between rural LEC and other service territories, and suggest that the Commission's focus should be directed toward eliminating such excessive access charges in the first place.

The NPRM's pejorative characterization of what it refers to as "arbitrage" reflects a fundamental misconception of the role competition in telecommunications markets that Congress intended when in enacted the Telecommunications Act of 1996, "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2] If a CLEC operating in an area served by a rural ILEC is able to furnish the terminating service at a lower cost than the incumbent, that efficiency should be rewarded, certainly not punished. The regulatory "solution" being proposed in the NPRM would force the

[2] P.L. 104-104, *Telecommunications Act of 1996*, Preamble.

CLEC to forgo its cost advantage by reducing its price to some arbitrary level reflective of the lowest cost ILEC in the state, even if that prescribed price level is actually below the CLEC's cost. In which event the CLEC is forced out of the market and the rural ILEC's dominance and relative inefficiency is protected.

There is an important difference between the type of "arbitrage" being addressed by Judge Posner and what the Commission describes as "arbitrage" in the present context. As Judge Posner explains, "[t]he arbitrageur spots the artificial price difference, buys at the lower price, and resells at the higher price. The effect is to bring about price uniformity, which terminates the arbitrage opportunity." This occurs in open competitive markets because prices are free to adjust to reflect changes in demand. In the present context, however, the prices and price relationships have been dictated through a regulatory process and thus will not converge on a single price where the products or services at issue are the same. The persistence of what the Commission characterizes as "arbitrage" represents a failure of regulation, one that should ultimately be corrected, through simplification and unification of rate structures, as the Commission appears to recognize elsewhere in the NPRM.

But in pursuing such long-term corrective measures it is critical that new distortions not be introduced in the interim, since that will operate merely to transform the "arbitrage," not eliminate it. Presented with the prices and price relationships dictated by the regulatory process, service providers have responded to these pricing signals by formulating business models and making often substantial capital investments. Periodic changes to these prices and price relationships – for example, the segregation of "ISP-bound" local dial-up terminations for special treatment – undermine these business models and associated investments, and create a level of regulatory uncertainty that discourages entrepreneurial investment while benefitting incumbents.

The real problem in intercarrier compensation today is regulatory uncertainty, which breeds all manner of nonpayment and payment avoidance schemes. And contrary to the NPRM's perception, such payment avoidance is not limited solely to certain carriers that mislabel traffic so as avoid paying switched access charges. When the compensation rules applicable to certain classes of traffic are myriad, confusing, and poorly enforced—as they are today— there is an opportunity and a temptation for all carriers to simply deny any payment obligation whatsoever. This is akin to a shopper who takes merchandise out of a store without paying either because he believes that the stated price is excessive or because the clerk had neglected to put a price tag on it. Increasingly, carriers are taking advantage of regulatory "voids" to avoid payment obligations and boost their bottom lines.

While payment avoidance schemes benefit any carrier, the advent of the "all-you-can-eat" minute plans provide powerful incentives for the carriers that offer these plans to engage in payment avoidance. In an all-you-can-eat plan, a carrier offers its end-users the ability to place unlimited or nearly unlimited minutes-of-use, without regard to traditional retail classifications such as "local" or "long distance," for a fixed monthly fee. Once it has pocketed the monthly fee, the carrier's profitability for that month is determined in large part by how much of that revenue it must share with other carriers in the form of intercarrier compensation. The less compensation it pays other carriers, the more revenue it keeps for itself. Hence the incentive to avoid payment.

All-you-can-eat plans today are offered by RBOCs and other large ILECs, by incumbent cable companies, by incumbent CMRS carriers, and by interconnected VOIP providers. Indeed, incumbent LEC and incumbent cable MSOs offer bundles of voice access lines, voice minutes-of-use, and broadband Internet access and video services, further severing the connection between end users' use of the PSTN (which may vary widely from month to month and as between users) and the set monthly fee that the end users pay for all of their communications and entertainment services. Of course, these plans are enormously popular, and if priced correctly would have no negative effect on intercarrier compensation. The problem arises if, as seems to be the case, these plans are priced without taking into account lawful intercarrier compensation obligations. And the problem is exacerbated when regulatory uncertainty together with the lopsided litigation advantage afforded large incumbent providers gives these carriers a convenient excuse not to pay.

Evidence of widespread payment avoidance exists throughout the telecommunications industry. Even the largest, most established carriers appear to be taking advantage of regulatory uncertainty and the multiplicity of rates in a bid to slash their intercarrier compensation obligations. For example, a recent lawsuit filed in federal district court in Georgia alleges that:

> Verizon Business has used Cbeyond's network to originate and terminate long distance calls for Verizon Business' customers, but refuses to pay Cbeyond the rates set forth in Cbeyond's filed federal and state tariffs for these services. Instead, Verizon Business has made up its own rate for such services, purporting to unilaterally "re-rate" Cbeyond's service down to $0.0007 per minute. To date, Verizon Business's underpayments to Cbeyond are in excess of $900,000.00 and are continuing to increase.[3]

Similarly, a federal district court judge in Virginia recently found that:

> Sprint's justifications for refusing to pay access on VoIP-originated traffic; and its underlying interpretation of the ICAs, defy credulity. The record is unmistakeable: Sprint entered into contracts with the Plaintiffs wherein it agreed to pay access charges on VoIP-originated traffic. Sprint's defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost-cutting efforts…[4]

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[3] Complaint, *Cbeyond Communications, LLC v. MCI Communications Services, Inc. d/b/a Verizon Business*, U.S. District Court, Northern District of Georgia, Atlanta Division, Civil Action No. 1:11-cv-0693, at ¶ 5 (filed March 4, 2011).

[4] Memorandum Opinion, *Central Telephone Co. of Virginia, et al. v. Sprint Communications Co. of Virginia, Inc., et al.*, U.S. District Court, Eastern District of Virginia, Richmond Division Civil Action No. 3:09-cv-720 (filed March 2, 2011).

"Arbitrage" is not the problem the Commission should focus on. Enforcing existing ICC obligations, supporting the rule of law, and ensuring steady, reliable revenue streams is the key to an orderly transition to the Commission's long-term ICC reform goals.

II. Relationship of Interim Measures to Nationwide Broadband Availability

The relationship between the Commission's national broadband deployment goals and the interim measures—the proposed access stimulation rules especially—rely on a presumption that the regulatory savings realized by some carriers as a result of the measures will "trickle down" to broadband deployment initiatives. For example, the Commission states "[a]ccess stimulation imposes undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition," NPRM, ¶ 637, and "the record also suggests that the amount of capital that access stimulation diverts from broadband deployment and other investments that would benefit consumers is substantial." *Id*. Nowhere in the NPRM does the Commission offer any facts or evidence demonstrating that any such "diversion" has actually occurred or that but for the purported effects of "access stimulation" these funds would be directed specifically at broadband deployment.

Of course, there is no natural economic reason or motive for carriers to spend regulatory savings on the Commission's broadband initiatives. In order to ensure these savings are dedicated to the public policy goals outlined by the Commission, Core proposes that carriers which realize savings from the Commission's proposed interim measures, including access stimulation rules, must be required to direct those savings to broadband deployment in the hardest-to-serve areas. At the very least, such carriers should be required to pass through their savings to end users, as in the case of previous access reforms.

In addition, IXCs are the primary or only beneficiaries of the proposed rules. But IXCs do not deploy broadband; LECs do. The Commission is proposing to reduce the profitability of carriers that do deploy broadband (rural LECs) and grant a windfall to carriers that do not (IXCs). In the case of RBOCs, the Commission appears to assume that savings realized by their IXC divisions can or should be passed on to the RBOC's LEC divisions for broadband deployment. No factual support is offered for that assumption; LECs will invest in broadband where such investments are considered to be profitable, and not merely because their IXC divisions have realized an increase in free cash as a result of a reduction in access charges. Indeed, to the extent that the long distance market is competitive, competition will require that any reductions in access charges experienced by IXCs be flowed through in correspondingly lower IXC prices, resulting in no net gain in free cash available for broadband investment.

The chasm that exists between the Commission's broadband goals and the proposed interim rules—access stimulation in particular—is further demonstrated by the amounts of money implicated by these initiatives. The Commission notes that "Verizon estimates the industry impact to be between $330 and $440 million per year and… states that it will be billed between $66 and $88 million by access stimulators for approximately two billion wireline and wireless long distance minutes in 2010." Even using the most conservative estimate of the costs to deploy broadband nationwide including the hardest-to-serve areas, $300 to $400 million a year would not even make a dent in the Commission's goals, even assuming the entire amount is devoted to those goals. For example, by the end of 2010, Verizon had invested some $23-billion in FiOS, yet had announced back in March of 2010 that it would suspend further investment in FiOS after the end of that year. The $66 to $88 million impact Verizon ascribes to "access stimulation" (notably, this figure is what Verizon was "billed," not what it actually paid) could not have had more than an immeasurably small impact upon its FIOS investment plans, and there is no basis to expect or believe that eliminating such payments prospectively will have any material impact upon Verizon's FiOS plans or cause it even to review, let alone reverse, its March 2010 decision.

III. Interconnected VOIP

Interconnected VOIP by its very nature involves the PSTN. It is a transitional service and technology that will exist so long as there is a PSTN that uses TDM to any substantial degree. Interconnected VOIP traffic is by definition TDM on one side, and VOIP on the other. Applying a VOIP-VOIP cost structure is unreasonable. This traffic incurs costs in the same way as PSTN-PSTN traffic. Moreover, the FCC currently has no cost model for VOIP-VOIP traffic, and such a model is not even out for comment in this proceeding. To be clear, if a company interconnects using TDM, then it has TDM costs. In fact, it would have additional costs if it were required to supply the TDM/IP media gateway conversion, assuming its network is TDM beyond the interconnection. When a computer makes a phone call to a TDM network, it is still a phone call. It uses the exact same terminating function on the terminating network as an interstate long distance user using a traditional IXC, an intrastate long distance user using an IXC, a local call using either a traditional RBOC, ILEC, CLEC or a CMRS carrier, or a dial-up ISP call. To be clear, pricing for the termination function is for the termination function, regardless of the purpose or application for which the termination function was used.

Requiring or encouraging abandonment of older PSTN networks that use TDM is unwise—even if it is not the newest or most efficient technology for interconnection. There are many years of desirable use left in existing TDM technology and networks. Simply denying or unduly limiting financial recovery of carriers' TDM investments in the hope of hastening deployment of newer technology does not guarantee that newer technology will be deployed. It simply means that the old technology will be abandoned earlier.

VOIP is "telecommunications" and subject to existing ICC rules, tariffs and agreements. It fits the statutory definition, and is consistent with the FCC's and the state commissions' treatment of interconnected VoIP in a wide range of instances. For example, in case involving Global NAPs, a CLEC and VOIP carrier, the Pennsylvania Public Utility Commission found that:

> GNAPs' function of transmitting and then indirectly accessing and terminating traffic at Palmerton's network facilities is a common carrier telecommunications service, and the Commission has subject matter jurisdiction. GNAPs' fundamental telecommunications service function is not altered by the fact that GNAPs transports a "mix" of traffic including the "unique type" of VoIP calls. A large part of the evidentiary record in this proceeding has been consumed in an attempt to ascertain whether the Commission's subject matter jurisdiction is dependent upon the traffic protocols of the calls transported by GNAPs and indirectly terminated at Palmerton's facilities rather than on the overall transportation function that, in and of itself, legally and technically constitutes a common carrier telecommunications service irrespective of the technical protocol classification of the traffic being carried. This telecommunications service is clearly provided by a common carrier telecommunications utility that has been duly certificated to operate as such by this Commission within specific areas of the Commonwealth.[5]

The Commission need not and should not create a brand new ICC regime for yet another subcategory of traffic.

Given the Commission's repeated concerns regarding "arbitrage," singling out interconnected VoIP for bill-and-keep treatment, NPRM, ¶ 615 would serve only to transform the nature of such "arbitrage," certainly not eliminate it. Without fundamental reform of ICC, bill-

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[5] Opinion & Order, *Palmerton Telephone Company v. Global NAPs South, Inc., Global NAPs Pennsylvania, Inc., Global NAPs, Inc. and Other affiliates*, Pa. P.U.C. Docket No. C-2009-2093336, at 8-9 (entered March 16, 2010).

and-keep for one type of traffic is irrational and would create an arbitrary technology-based price differential. Similarly, VOIP-specific rates, NPRM, ¶ 616, would merely increase the multiplicity of different rates for different traffic types, without any cost justification. Finally, determining applicable rates only "as of some future date," NPRM, ¶ 617 would only exacerbate disputes, litigation, and payment avoidance.

IV. Phantom Traffic

Addressing the phantom traffic issue affords the Commission an opportunity to resolve outstanding ICC disputes and litigation, instead of increasing them. Core applauds and supports the Commission proposal "to require that the calling party's telephone number be provided…" NPRM, ¶ 626. Identifying the calling party's number in the SS7 context, and the ANI and/or Caller ID in the MF signaling context, will certainly help carriers reduce and narrow call rating disputes. For this reason alone, carriers should be required to pass CPN and ANI through all legs of the phone call.

However, simply requiring passage of the originating calling number is insufficient for a number of practical reasons, since that requirement alone would not reliably identify the network accountable for the call. For example, if a call is originated from LEC A, transits an IXC, then transits an ILEC tandem, and is terminated by LEC B, the identification that the number resides on LEC A's network doesn't help LEC B identify the IXC as the party responsible for the access charge. That responsibility technically must be fulfilled by the terminating tandem provider. The tandem switch knows the call came from the IXC, and that identification must be passed, because LEC B simply assuming LEC A is responsible is faulty. This is an increasingly acute issue because many VOIP carriers, and their LEC partners, send all calls—whether intraLATA, local, intrastate, or interstate—through the ILECs' intraLATA/local tandems, which do not routinely provide all records for those calls. This leaves LEC B guessing as to which carrier to bill. The Commission should require the tandem provider, whether incumbent or competitive, to pass identification of the carrier that sent them the call, as well as the originating number, to the terminating carrier.

Finally, the Commission should consider implications of an increasingly prevalent scenario in the VOIP context. VOIP end-users today routinely use several different VOIP carriers for different functions, including using different carriers for originating and terminating calls. When such an end user places a call, it may pass the phone number assigned by its terminating VOIP carrier, not its originating VOIP carrier. The calling party number in this scenario becomes only a return address, and has not relation to the VOIP carrier (or its LEC partner) originating the call. Simply put, with routing technology available on VOIP phones at the end user level, there is competition and choice for both the originating function and the terminating function. Assuming the carrier which handles the terminating function is the same as the carrier which handles the originating function is faulty.[6] The Commission should consider rules to address this scenario.

V. Access Stimulation

Core has addressed certain flaws in the economic reasoning supporting the interim measures regarding access stimulation in these comments, above, at pages 7-9. Here, Core offers comments on specific factual assertions as well as the proposed interim measures and accompanying proposed rules.

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[6] Market economics dictates that this type of specialization is highly beneficial, and should it be encouraged wherever possible. Specialization reduces inefficiency and expands on the promise and potential of the 1996 Act designed to promote competition and allow market efficiencies to improve telecommunications.

The Commission's broad condemnation of "generating elevated traffic volumes to maximize revenues," NPRM, ¶ 636, could be applicable to any LEC business plan. The goal of every carrier, and indeed good competition policy, is for that carrier to maximize the use of its network in order to increase revenues and profitability. The Commission fails to explain why these activities should be condemned or limited in some contexts, such as access stimulation, but not more generally.

The Commission's statements that "the significant costs of these arbitrage arrangements are in fact borne by the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers," NPRM, ¶ 636, and "[c]ustomers initiating calls to access stimulating entities are generally unaware that their calls are part of an access stimulation arrangement and that very high access charges are being assessed on the IXC," are explained at least in part by IXCs' own business decision to offer their end users unlimited calling at a fixed monthly price. The Commission fails to acknowledge the role of the all-you-can-eat calling plan in creating the conditions for the access stimulation activities it addresses.

The Commission notes that "parties have alleged that some LECs are also adopting traffic stimulation strategies with respect to reciprocal compensation rates," NPRM, ¶ 671, and notes that parties have suggested application of so-called "bill-and-keep" (really, a rate of 0) or a rate of $0.0007/MOU to allegedly stimulated traffic in the CMRS-CLEC context. NPRM, ¶¶ 671-73 Reciprocal compensation rates are set by state commissions using the Commission and Supreme Court-approved TELRIC methodology. Parties proposing a lower rate simply invite the Commission to trample on that methodology as well as the work of the state commission in deriving those rates. TELRIC approximates a carrier's cost of providing the termination function.

Consequently, requiring use of a lower rate, such as $0 or $0.0007 is to require carriers to terminate traffic at a below-cost rate. The primary effect of such a measure would be to provide the originating carriers a regulatory windfall, strip terminating carriers of a lawful and important revenue stream, and result in a regulatory takings.

Comments on Specific Proposals

The Commission proposes:

> that if a rate-of-return LEC or a competitive LEC is a party to an existing access revenue sharing agreement or enters into a new access revenue sharing agreement, the revised rules outlined below for interstate switched access charges would become applicable. More specifically, we propose to focus on revenue sharing arrangements between the LEC charging the access charges at issue and another entity that result in a net payment to that other entity over the course of the agreement. For this purpose, revenue sharing includes all payments, including those characterized as marketing fees or other similarly named payments that result in a net payment to the access stimulator. NPRM, ¶ 659.
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> Specifically, the Commission proposes to adopt this rule:
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> Appendix C
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> § 61.3 Definitions.
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> * * * * *
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> (aaa) Access revenue sharing. Access revenue sharing occurs when a rate-of-return ILEC or a CLEC enters into an access revenue sharing agreement that will result in a net payment to the other party (including affiliates) to the access revenue sharing agreement, over the course of the agreement. A rate-of-return ILEC or a CLEC meeting this trigger is subject to revised interstate switched access charge rules.

The proposed rule fails to define "access revenue sharing agreement," leaving open varying interpretations which will lead to more, not less, disputes and litigation. Access revenue is an important component of most LECs' overall revenue. Accordingly, it could be argued that LECs "share" their access revenue with each and every vendor and supplier to whom they make "a net payment." The rule makes no distinction between the agreements it covers, and those it does not. Similarly, "access stimulator" is not defined, which, again, will lead to more, not less, disputes and litigation.

The Commission also proposes:

> [W]e propose that when competitive LECs meet the trigger, they would be required to benchmark to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, if they are not already doing so. This modification recognizes that competitive LECs that meet the trigger have access demand likely to be more comparable to that of the BOC in the state or of the incumbent LEC with the largest number of access lines in the state, rather than smaller carriers to which they previously could have been benchmarking." NPRM, ¶ 665.
> Appendix C
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> And, proposes this rule:
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> § 61.26 Tariffing of competitive interstate switched exchange access services.
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> * * * * *
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> (g) Notwithstanding paragraphs (b)-(e) of this section, a CLEC engaged in access revenue sharing, as that term is defined in section 61.3(aaa) of this Part, shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the RBOC in the state, or, if there is no RBOC in the state, the incumbent LEC with the largest number of access lines in the state.

Benchmarking "to the rate of the RBOC in the state… or the independent incumbent LEC with the largest number of access line in the state if there is no BOC…" suffers from two flaws. First, it is neither fair, nor good economics, to benchmark the access rates of a facilities-based CLEC operating in rural territories to those of three of the largest telecommunications companies in the nation and indeed, the world unless the FCC is similarly prepared to enforce identical treatment to rural incumbent LECs as well. RBOCs have economies of scale and diversity of revenue streams which far outstrip even the largest CLEC, never mind a small regional CLEC such as Core. Whether or not the proposed trigger is met, it simply makes no sense to cap CLEC rates at RBOC rates in rural territories where RBOCs do not even offer service. A better proposal would be to benchmark the rates of a CLEC that meets the trigger to those of any incumbent LEC (rural or not) with revenues greater than that of the CLEC. This proposal would better approximate the scale of the CLEC's "access demand" and the appropriate rate for that demand. Second, the proposal would simply have the effect of moving access stimulation activity to the handful of states in which there is no BOC, and in which the largest incumbent LEC has the highest tariffed rates on file. There is and can be no policy justification for this result.

Respectfully Submitted,

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